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United States v. Parkinson, 05-50255

B. Fletcher, dissenting

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U.S. COURT OF APPEALS

I respectfully dissent. Parkinson's due process rights were violated and the error was far from harmless.

The majority recites the law that governs the right to confrontation in revocation hearings, analyzing it as a due process violation, not a violation of the Sixth Amendment right to confrontation. *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005). It acknowledges that the court must apply the balancing test set out in *Morrisey v. Brewer*, 408 U.S. 471 (1972), to determine whether there has been a due process violation in the admission of hearsay evidence at a revocation hearing. It does not deny that *Morrisey* requires the court to weigh the releasee's "right to confrontation against the Government's good cause for denying it." *United States v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993). So far so good.

It is at this point that the majority's analysis goes awry. The majority's first mistake is to find Parkinson's interest in confrontation, one side of the *Morrisey* balancing test, to be "weak." When evaluating a releasee's right to confrontation, among the factors the court should consider are "the importance of the evidence to the court's ultimate finding, the virtually complete denial of any opportunity to refute the evidence, and the consequences of the court's finding." *Martin*, 984

F.2d at 311. The majority concludes that the absence of the testing officer was harmless on the ground that Parkinson's testimony and Young's non-hearsay testimony were sufficient to establish that Parkinson had violated a condition of his supervised release: that is, submission of an invalid urine sample was established, and therefore revocation was appropriate, even without consideration of Young's hearsay testimony. This is simply, wrong.

Young's non-hearsay testimony consisted of her recalling that she had told Parkinson that drinking a lot of water could result in a flushed sample. Parkinson testified that he had been drinking a lot of water for medical purposes prior to his drug test. This testimony does not establish that Parkinson's urine sample was in fact flushed, the critical issue in determining whether he had violated a condition of his supervised release. The majority relies on these vague statements as proof of violation; by contrast, a test-result finding a flushed urine sample is specific and is based on scientific evidence. Parkinson's and Young's non-hearsay testimony cannot be evidence of a fact that requires scientific precision. Based on the evidence produced, we do not know whether the sample was an invalid flushed sample. The testimony of the testing officer was essential to any such finding.

Second, it is doubtful that Parkinson's drinking "a lot" of water contrary to the instructions of his probation officers where the medical necessity to drink a lot

of water to ameliorate the symptoms of his diabetes caused him to do so constitutes a violation of his supervised release conditions. Third, Parkinson denied that he was using drugs. It would seem that this alone would preclude a finding of harmlessness. The protocol specified in the government's own manual calls for retesting in these circumstances. *Martin*, 984 F.2d at 312. That re-testing did not occur here.

The failure to undertake the required *Morrissey* balancing, employing the factors considered in *Martin*, violated Parkinson's due process rights. This violation was harmful. First, given the highly doubtful nature of the conclusion that drinking a lot of water for medical reasons violates a condition of supervised release, the results of the urine test (was his sample, in fact, flushed?) were critical to any justification to revoke Parkinson's supervised release. Second, because the results of the test were important to the court's ultimate finding, Parkinson had a strong interest in refuting those test results and had no opportunity to do so because Coleton, the testing officer, did not testify. Third, as to the consequences of the test results, they were important to the revocation. Young could not testify to the chain of possession of the urine sample nor its actual testing. "[T]he importance of the test results and the denial of any meaningful opportunity to impeach the results would suffice to conclude that [releasee's] right to confrontation was substantial."

Martin, 984 F.2d at 312.

On the other side of the *Morrissey* scale, the government has offered nothing to support its interest in denying Parkinson's right to confrontation. The government has advanced no reason for failing to produce Coleton. In summary, Parkinson's due process rights were violated and the violation was harmful. The government should have produced Coleton for cross examination; the district court should have sustained Parkinson's hearsay objection and should have required confrontation. Without it, the court should have declined to find a violation of Parkinson's conditions of parole.